THE CONFLICT BETWEEN RESERVATIONS OF TITLE AND PRIOR MORTGAGES IN SOUTHERN TERRITORY.

THE law ought to be and doubtless is, in most instances, the friend of commerce and industry. Occasionally, however, it exhibits phases in which it appears quite the contrary. For example, one of the repressive influences in the industrial and manufacturing development of the South today is the doctrine of fixtures and the manner of its interpretation and enforcement by certain of the courts. To illustrate, take the following hypothetical case: A corporation is chartered and organized for the purpose of constructing and operating a cotton mill. It is the plan of the promoters to invest one hundred and fifty thousand dollars in the necessary land, building and equipment. By stock subscription, they raise one hundred thousand dollars which is spent in securing the site, erecting the buildings and purchasing part of the machinery. They then find that it is impossible to secure more funds by stock subscription and that their only resource is to mortgage what they have acquired. They accordingly borrow fifty thousand dollars, giving as security a mortgage covering the entire assets of the company. The mortgage is properly executed and duly recorded.

With the funds thus secured, the mill is equipped and completed according to the original plans. It begins operations and runs for a year. It is then discovered by the directors that they have miscalculated; that the machinery equipment is insufficient to operate economically and that in order to produce an output in proper proportion to the operating expenses it is imperatively necessary to acquire additional looms. Confronted by this necessity, and having in hand no available funds, they make another effort to sell stock. Failing in this, they attempt to place another mortgage, but this also results in failure. In short, the credit of the company is exhausted, and the purchase of the required looms seems an impossibility. At this juncture, they

learn of a manufacturer who sells on credit, allowing the purchaser to pay one-fourth in cash and give notes for the balance, maturing at stated intervals, but with the express condition that the title is not to pass until the entire purchase price has been paid, with the right, in case of default, to enter the mill, remove the looms and take them back into his possession. The directors enter into negotiations with him and succeed in inducing him to sell them the looms, and also, on account of their financial difficulties, to waive the usual cash payment and accept four notes in equal amounts due in four, eight, twelve and sixteen months. The title is to be reserved in him until payment is completed, and, in event of default in meeting any of the notes, he is to have the right to enter the mill, remove the looms, and retake them into his possession.

The contract evidencing this agreement having been reduced to writing and properly recorded in the public registry, the looms are shipped to the mill, set up in position, and bolted and screwed to the floor so as to become, in contemplation of law, a part of the freehold and fixtures.

With a complete equipment thus secured, the mill resumes operations, but owing, let us say, to inexperience or mismanagement, it is unable to succeed or pay its debts, and its struggles finally end in insolvency and bankruptcy. Both the mortgage and the purchase money notes are in default.

The bankruptcy court having taken charge, a conflict is immediately precipitated between the holder of the fifty thousand dollar mortgage and the loom manufacturer. The contention of the former is that his mortgage covers all the assets of the mill, including the looms in question, and that the whole should be sold to satisfy his debt. The latter simply exhibits his contract and insists upon the right of removal. The issue thus joined is brought before the court for determination.

The evidence discloses that the removal can be accomplished without injury to the building, leaving it exactly as it was prior to the installation. It also discloses that on account of the insolvency of the estate, if the manufacturer's petition be denied and he be relegated to the position of a general creditor only,

he will receive nothing whatever and his property will have been taken from him without the slightest compensation. It further discloses, on the other hand, that, if his petition be granted, the plant will yet stand exactly as it was when the mortgage was delivered, and the mortgagee will have the benefit of all the security for which he bargained. Under these circumstances, what will be the decision of the court? Will the manufacturer be permitted to retake his property, or will it be handed over to the mortgagee to be sold with the rest of the assets to pay the mortgage?

In their answers to this question, the courts reveal a wide divergence of opinion. Sustaining the manufacturer and following what may be termed the New Jersey rule are the Supreme Court of the United States,[1] the Circuit Court of Appeals for the Third Federal Circuit,[2] the former Federal Circuit Court for Iowa,[3] and the Supreme Courts of New Jersey,[4] New York,[5] Alabama,[6] California,[7] Idaho,[8] Illinois,[9] Indiana,[10] Louisiana,[11] Michigan,[12] Minnesota,[13] New Hampshire,[14] North Carolina,[15] South Carolina,[16] Texas,[17] Vermont,[18] West Virginia,[19] and Washington.[20] Taking the contrary view and following what is known as the Massachusetts rule are the Circuit Courts of

[1] York Manufacturing Co. *v.* Cassell, 201 U. S. 344.
[2] New Chester Water Co. *v.* Holly Manufacturing Co., 53 Fed. 19.
[3] Manhattan Trust Co. *v.* Sioux City Cable Ry. Co., 76 Fed. 658.
[4] Campbell *v.* Roddy, 47 N. J. Eq. 244.
[5] Duffus *v.* Howard Furnace Co., 40 N. Y. Supp. 925.
[6] Wood *v.* Holly Mfg. Co., 100 Ala. 326.
[7] Hendy *v.* Dinkerhoff, 57 Cal. 3.
[8] Anderson *v.* Creamery Package Mfg. Co., 8 Idaho 200.
[9] Schmuacher *v.* Allis Co., 70 Ill. App. 556.
[10] Binkley *v.* Forkner, 117 Ind. 176.
[11] Baldwin *v.* Young, 47 La. Ann. 1466.
[12] Crippen *v.* Morrison, 13 Mich. 23.
[13] Northwestern Mut. Ins. Co. *v.* George, 77 Minn. 319.
[14] Langdon *v.* Buchanan, 62 N. H. 657.
[15] Cox *v.* New Bern Lighting Co., 151 N. C. 62.
[16] Padgett *v.* Cleveland, 33 S. C. 339.
[17] Willis *v.* Munger Mach. Mfg. Co., 13 Tex. Civ. App. 607.
[18] Davenport *v.* Shants, 43 Vt. 546.
[19] Hurxthal *v.* Hurxthal, 45 W. Va. 584.
[20] German Sav. & L. Soc. *v.* Weber, 16 Wash. 95.

Appeals for the Fourth,[21] Fifth [22] and Sixth [23] Federal Circuits, the former Federal Circuit Court in Virginia,[24] and the Supreme Courts of Massachusetts,[25] Pennsylvania,[26] Wisconsin,[27] Delaware [28] and Maine.[29]

The reasoning of the courts taking the former view can be best exemplified by an extract from the opinion in the leading case of Campbell *v.* Roddy,[30] decided by the Supreme Court of New Jersey in Equity in 1888:

> "It is difficult to perceive any equitable ground upon which the property of another, which the mortgagor annexes to the mortgaged premises, should enure to the benefit of a prior mortgagee of the realty. The real estate mortgagee had no assurance at the time he took his mortgage that there would be any accession to the mortgaged property. He may have believed that there would be such an accession, but he obtained no right by the terms of his mortgage, to a lien upon any thing but the property as it was conditioned at the time of its execution. He could not compel the mortgagor to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he took, he has no ground for complaint. There is, therefore, no inequity towards the prior real estate mortgagee, and there is equity towards the mortgagee of the chattels, in protecting the lien of the latter to its full extent so far as it will not diminish the original security of the former. As already remarked, the real estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value, it became subjected to the lien

[21] Union Trust Co. *v.* Southern Saw Mills & Lumber Co., 166 Fed. 193; Tippett *v.* Barham, 180 Fed. 76.

[22] Guaranty Trust Co. *v.* Galveston City R. R. Co., 107 Fed. 312.

[23] Phœnix Iron Works Co. *v.* N. Y. Security & Trust Co., 83 Fed. 757; Evans *v.* Kister, 92 Fed. 828.

[24] In re Williamsburg Knitting Mills, 190 Fed. 871.

[25] Hunt *v.* Bay State Iron Co., 97 Mass. 279.

[26] Bullock Electric Mfg. Co. *v.* Lehigh Valley Traction Co., 231 Pa. 129.

[27] Fuller-Warren Co. *v.* Harter, 110 Wis. 80.

[28] Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192.

[29] Hawkins *v.* Hersey, 86 Me. 394.

[30] 47 N. J. Eq. 244.

of the prior real estate mortgagee, but the value of his interest was the value of the property subjected to the lien."

The reasoning on which the contrary rule is based is illustrated in the following excerpt from the opinion in Tippett & Wood *v.* Barham (1910):[31]

"We think this latter doctrine announces the correct principle; especially where the application is, as in the present case, confined to a case wherein the mortgage (containing an after-acquired property clause) has been drawn for the purpose of embracing the entire working plant of the corporation, including its franchises, as in such cases it is usually true that the mortgage is given at a time when the real estate is but very insufficient security for the debt, and the subsequent accessions are very generally made by the expenditure of the funds derived by reason of the negotiation of the bonds secured by such a mortgage, and the mortgage is made and received in contemplation of such accessions. In such cases the equities of the beneficiaries under the mortgage should and must attach to such accessions as, under the description contained in the mortgage, are included within it, unless some higher equity or a legal title intervenes. * * * In the case at bar the structure in issue, having become affixed to a part of the freehold which, at the time it was so affixed, was subject to the lien of the mortgage in equity, thereby became (except as to parties to the contract) a part of the real estate, and, by operation of law, became subject to the mortgage without regard to any agreement between the mortgagor and the person furnishing or erecting such property or structure."

It is probable that if the question were put to average business men, to be determined according to their own conceptions of justice, there would be an unhesitating and unanimous judgment in favor of the manufacturer. Taking an untechnical view, they would probably be puzzled to understand how any other result could be reached, and why the plain terms of the manufacturer's contract should not be enforced. Knowing that the removal of the looms, on the one hand, would not deprive the mortgagee of any part of the security upon which he relied in making his loan, and, on the other, would simply carry

[31] 180 Fed. 76.

out the manufacturer's contract and restore to him his own property for which he had not been paid, recaption would appear to them to work out equal and exact justice and give to each of the parties that to which he was entitled and no more. The contrary view—to take the property of the manufacturer, for which he had received not a penny and deliver it bodily into the hand of the mortgagee to be appropriated to the payment of his debt—would strike our court of average business men, to say the least of it, as queer and unreasonable.

There is another observation to be made at this point on the practical aspect of the question. If it be the law, that, in a contest, as above stated, between the mortgagee and the manufacturer, the former is to prevail, two practical results are inevitable. First, when it becomes generally known and its consequences understood, manufacturers of machinery the nature of which requires it to be permanently attached in place will refuse, when there is any question as to their being paid, to sell on time with only a title reservation as security. And second, the discontinuing of such sales, by depriving young and struggling manufacturing enterprises, and indeed many old ones, of the credit basis on which most of them must rely to secure their equipment, would deal a heavy blow to the industrial interests of the community. In the South, where capital is comparatively limited and difficult to secure for new enterprises, and where the development of its manufacturing interests is so imperative a necessity, the effect of such a rule of law would be particularly unfortunate.

Under the present bankruptcy act, the United States Courts have jurisdiction in bankruptcy of corporations engaged principally in manufacturing and in mining,[32] and inasmuch as the question under discussion does not now ordinarily arise except in event of bankruptcy, these courts exercise a practically exclusive jurisdiction in the matter. Their attitude, therefore, is of first importance.

Of the nine Federal judicial circuits, in four have cases involving this point come before the Circuit Court of Appeals,

[32] Bankruptcy Act, § 4b.

and it so happens that the territorial jurisdiction of three of these covers the entire Southern States with the exception of Oklahoma and Arkansas, to-wit: The Fourth, the Fifth, and the Sixth Circuits.

In each of these three courts, the rule has been established that in a contest between a conditional vendor with reservation of title of personal property which has become a fixture by permanent annexation to the freehold and a prior mortgagee of the realty to which the annexation was made, the latter has the superior right, and is entitled to have the fixture so acquired sold with the rest of the assets for the satisfaction of his debt, regardless of whether its removal would injure the freehold.

The practical effect of this doctrine on the public welfare has been suggested. Aside from any consideration as to its legal soundness, the fact that it is the prevailing and accepted rule throughout this vast territory, where it is being constantly enforced by referees and Districts Courts in bankruptcy, seems unfortunate.

Following the case of Union Trust Co. *v.* Southern Saw Mills and Lumber Company [33] (1908) arising in North Carolina, the Circuit Court of Appeals held in the case of Tippet *v.* Barham [34] (1910) arising in Virginia:

> "In the case at bar, the structure in issue, having become affixed to a part of the freehold which, at the time it was so affixed, was subject to the lien of the mortgage in equity, thereby became (except as to the parties to the contract) a part of the real estate, and, by operation of law, became subject to the mortgage without regard to any agreement between the mortgagor and the person furnishing or erecting such property or structure."

The same view was taken in Re Williamsburg Knitting Mills,[35] arising in Virginia and decided in 1911 by its District Court.

The Circuit Court of Appeals for the Fifth Circuit rendered a similar decision in 1901 in the case of Guaranty Trust Com-

[33] 166 Fed. 193.
[34] 180 Fed. 76.
[35] 190 Fed. 871.

pany of New York *v.* Galveston City Railroad Co.[36] The eighth headnote is as follows:

> "A mortgage of a street-railroad system covering after-acquired property creates a lien on engines thereafter furnished to the company in constructing a plant which was a part of its system, and is not to be displaced by a stipulation in the contract of sale that title should not pass till they were fully paid for."

In the case of Evans *v.* Kister,[37] decided in 1899, the Circuit Court of Appeals for the Sixth Circuit, Circuit Judges William H. Taft and Horace H. Lurton presiding, declared that:

> "Upon the other hand, if the machinery so purchased and set up has become so affixed as to be a part of the principal thing, it will pass under the mortgage, notwithstanding an agreement between the mortgagor and furnisher that the title shall remain in the vendor until payment. Mere registration of an agreement between the mortgagor and vendor, preserving the personal character of property affixed to the freehold mortgaged, will not prevent the attached property from passing under a previously existing mortgage."

In the case of Phœnix Iron Works Co. *v.* New York Security and Trust Co.,[38] decided in 1897, also arising in Kentucky, the same court held:

> "Machinery constituting the complete steam plant and motive power of a street railroad, when placed in its power house, becomes an integral part of the property, as a railroad system, and passes under mortgage, previously executed and recorded, covering the entire road and plant, constructed and to be constructed, though such machinery was placed in the building under a contract by which the seller reserved title until full payment was received therefor, which payment has never been made."

On the other hand, in 1892, the Circuit Court of Appeals for the third circuit, covering the states of Pennsylvania, New Jer-

---

[36] 107 Fed. 312

[37] 92 Fed. 828.

[38] 83 Fed. 757.

sey and Delaware, held in the case of New Chester Water Company *v.* Holly Manufacturing Company: [39]

> "There is no public policy which renders invalid a contractual vendor's lien upon the pumping engines of a water company. On a sale of pumping engines for waterworks, the purchaser expressly agreed that the seller should have a lien thereon, with full right of possession until the price was paid. Held, that this showed an intent that they should not become a part of the realty, and, under the Pennsylvania decisions, this intent was controlling, and the lien was not waived in favor of the mortgage holders or other creditors by attaching the engines to the foundation in the usual manner."

An interesting feature of this case is that the court regards the question as being a matter of local law on which the decisions of the State Courts should control. That the Federal Courts, on questions relating to real estate, should be governed by the local decisions is settled.[40] But is the main point at issue a question of the law of real estate? Is it not rather the extent of the power of private contract? Is it not really this: although it be conceded that, under the local law, a chattel has been attached to the freehold in such a manner as would ordinarily change its character to realty and render it a part of the freehold and a fixture, may not its vendor and vendee, when the interests of third persons will not be injuriously affected, lawfully and effectually agree between themselves that the thing sold shall retain its character as personalty? [41] It is not believed that the Federal courts are bound in this matter by state decisions. It is a general question on which they may formulate an independent view, but it is unfortunate and indeed anomalous that between two systems of courts occupying the same territory there should be so wide a divergence of opinion on so important a question.

The rule declared by the Circuit Court of Appeals for the Fourth Circuit is in conflict with the decisions of the highest courts of three of the states embraced in the circuit, to-wit,

[39] 53 Fed. 19.

[40] Green *v.* Van Buskirk, 5 Wall. (U. S.) 307; Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 671; N. Y. Life Ins. Co. *v.* Allison, 107 Fed. 179.

[41] Wood *v.* Hewett, 8 Ad. & El. 913; 2 Kent. Com., 14th Ed. 343, note.

West Virginia, North Carolina and South Carolina. The Supreme Court of Appeals of Virginia has apparently not passed on the question. A Maryland case approaches but does not exactly cover the point.

In 1898, the Supreme Court of Appeals of West Virginia, in the case of Hurxthal *v.* Hurxthal,[42] said:

> "A chattel mortgage is effectual to preserve the character of the mortgaged chattels as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate, or the buildings thereon. If the detachment would occasion some diminution in the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjudicated according to the equity of the case. This rule is said to be firmly established in the interests of trade. That the realty mortgagee's security is kept whole is all that he can ask, as against the property of third parties. When the mortgaged personal property is attached to the realty, the mortgagor has only an equity of redemption therein, to which the mortgage on the realty at once attaches."

The Supreme Court of North Carolina in 1909 in Cox *v.* New Bern Lighting Company,[43] said:

> "We think a very clear statement of the principle controlling one feature of this case is found in Jones on Chattel Mortgages (5th Ed.), § 133 A, as follows: 'One holding a mortgage of the realty has no equitable claim to chattels subsequently annexed to it. He has parted with nothing on the faith of such chattels. Therefore the title of a conditional vendor of such chattels, or of a mortgage of them, before or at the time they were attached to the realty, is just as good against the mortgagee of the realty as it is against the mortgagor."

In 1890, the Supreme Court of South Carolina, in Padgett *v.* Cleveland,[44] said:

> "The engine now in question was afterwards purchased * * * under an express stipulation and condition that

[42] 45 W. Va. 584.
[43] 151 N. C. 62.
[44] 33 S. C. 339.

> 'the title should remain in the vendor until paid for.' * * * Whether an article of personal property is or is not made a fixture, must depend to a considerable extent upon the circumstances and intent of the parties. Tanner and Lemaster did not have the absolute title to the engine, so as to authorize them to dedicate it for the benefit of a mortgage already executed; and without the consent of the vendors, they could not, if they had wished to do so, make the engine a permanent part of the lot mortgaged."

The case of Central Trust Co. *v.* Artic Ice Machine Manufacturing Company,[45] decided by the Court of Appeals of Maryland in 1893, while showing a somewhat different state of facts, states the same view:

> "Though the Artic Company (the conditional vendor) by the recordation of the mortgages, have had or be chargeable with constructive notice that the Maryland Ice Company (the conditional vendee) had covenanted with the bondholders that all new machinery should be considered real estate and be subject to the lien of the mortgage, still the plainest principle of natural justice would preclude any bondholder who, before he purchased a bond, participated in creating a lien in another's favor, from afterwards repudiating and destroying that lien for his own benefit and gain."

In its position on this subject, the Court of Appeals for the Fifth Circuit is in conflict with the Supreme Court of Alabama, with that of Louisiana, and with the Court of Civil Appeals of Texas. The Supreme Court of Texas, under the influence of the local registration law governing conditional sales, seems, in the case of Sinker *v.* Comparet,[46] to have taken the contrary view. The question has not been decided by the Supreme Courts of Florida, Mississippi, or Georgia. The Georgia case of Cunningham *v.* Cureton,[47] has been cited as sustaining the Massachusetts rule, but while the sale contract was made before, it does not appear whether actual delivery and annexation took place before or after the execution of the mortgage.

---

[45] 77 Md. 202.

[46] 62 Tex. 470.

[47] 96 Ga. 489.

In Wood *v.* Holly Manufacturing Company,[48] the Supreme Court of Alabama, in 1893, said:

> "The equitable lien of the seller of pumping engines for water works and which are attached to realty, will prevail as against a purchaser of the realty unless the purchaser establishes that the engines were so attached to the freehold as to become fixtures, and that he is a bona fide purchaser of the realty for value without notice. A mortgage covering after-acquired property does not take precedence of a lien expressly retained by the seller on the property for its price."

In 1895, the Supreme Court of Louisiana, in Baldwin *v.* Young,[49] held:

> "The vendor under a sale conditioned that the property shall be his until payment of the price does not lose the right thus reserved, because the purchaser, for the service and improvement of a building, places such property therein, and against the creditor of the purchaser with a mortgage on the building the unpaid vendor may enforce his right to remove the property sold."

In 1896, the Texas Court of Civil Appeals, in Willis *v.* Munger Machine Company,[50] held:

> "The contention is, that notwithstanding the machinery should be treated as personalty as between the Munger Company and Hilderbrandt and Bohne (the vendees) yet as to appellants it shall be regarded as a part of the realty. We do not think this contention is based upon any sound principle. By sustaining and applying it in this case, the Munger Company would lose the security taken for their machinery, and appellants (the mortgagees) would have the value of the machinery added to the realty upon which their vendor's lien rested, without valuable consideration paid or any damage to be done to their security by the removal of the machinery. The vendees had the right to place the machinery upon the lot without forfeiting the right of its removal, so long as it could be done without injury to the realty. As they possessed that right, they

[48] 100 Ala. 326.
[49] 47 La. Ann. 1466.
[50] 13 Tex. Civ. App. 607.

could incumber it with a mortgage to another, with such right of removal to satisfy the mortgage lien."

The ruling of the Court of Appeals for the Sixth Circuit, *supra,* is in conflict with the Supreme Court of Michigan and a District Court of Ohio. It is sustained by the Court of Appeals of Kentucky.[51] The Supreme Court of Tennessee has apparently not considered the question.

In Crippen *v.* Morrison,[52] it was said in 1864 by the Supreme Court of Michigan:

"It is claimed, however, that, by the rules of law, fixtures made after a mortgage belong to the mortgagee, and that the mortgagor has not such an estate as will authorize any one to make an agreement with him touching the use of the land. Under the English rule, which gives the mortgagee an immediate right of possession, the mortgagor cannot give others a right he does not himself possess; and should he erect improvements which could not be severed without injury, they must undoubtedly continue on the premises. Improvements made by him would be presumed to be made for the benefit of the inheritance. But we think those cases which make this presumption absolute, not only as against him but as against other owners of chattels placing them on the premises, go beyond reason, and divest property without any necessity or propriety, when its nature has not, in fact, been changed."

In Hine *v.* Morris[53] (1878), a District Court of Ohio said:

"Mill shears, furnace castings, boiler fire fronts, and rolls placed in a mill for the manufacture of railroad spikes, upon solid timbers, and stone foundations, and secured by a note and chattel mortgage, are removable fixtures as between the chattel mortgagee and a prior mortgagee of the realty."

The Supreme Court of the United States in the case of York Manufacturing Co. *v.* Cassell,[54] decided in 1906, aligned itself with the courts following the New Jersey rule. This case is best known as the decision leading to the enactment of Section 8

---

[51] Westinghouse Electric Mfg. Co. *v.* Citizens, etc., R. R. Co., 68 S. W. 463.

[52] 13 Mich. 23.

[53] 3 Wkly. Law Bul. 515.

[54] 201 U. S. 344

of the Act of 1910 amending the bankruptcy act in reference to the position of trustees, but it contains a clear-cut adjudication of the point now under consideration. It is true that in the opinion there is no reference to the conflict in the authorities, and practically no discussion, but it is evident that the facts raised, and the court decided, the precise issue. There had been several older decisions by this court in which similar questions arose and in which were stated the controlling principles,[55] but this was the first adjudication exactly in point. It will be noted that in the York Manufacturing Company case the court treats the existence in the mortgage of an "after-acquired" clause as immaterial. It will be interesting to observe the effect of this decision on the lower Federal Courts. In Tippett *v.* Barham,[56] decided four years later, it was not cited, and In re Williamsburg Knitting Mills [57] is apparently not regarded as bearing upon the question.

It is believed that the following criticism can be fairly made on the Massachusetts rule. First: It overlooks the fact that the doctrine of fixtures was formulated to supplement, not to displace, the express terms of contracts. It was a rule of interpretation where the parties had not sufficiently expressed themselves. It is an inversion of the doctrine, therefore, when the parties have clearly and definitely expressed their purpose in a contract needing no interpretation, to apply it so as to invalidate their contract and defeat their purpose. Second: Giving to the doctrine of fixtures its full force and conceding that a chattel permanently attached to the freehold and becoming an integral part of the building and its equipment should be regarded as a part thereof and a fixture, there is nevertheless no good reason why parties between themselves should not be permitted by private agreement to vary the rule when thereby the interests of third persons will not be injuriously affected. And third: It is illogical and unjust to hold the contract of the conditional

[55] Pennock *v.* Coe, 23 How. (U. S.) 117; Fosdick *v.* Schall, 99 U. S. 255; United States *v.* New Orleans R. R. Co., 12 Wall. (U. S.) 362; Meyer *v.* Western Car Co., 102 U. S. 1; Porter *v.* Pittburg Bessemer Co., 122 U. S. 267.

[56] 180 Fed. 76.

[57] 190 Fed. 871.

vendor to be at once both valid and invalid—valid in so far as the vendee and his other creditors derive title through it, and invalid in so far as it gives the vendor a security, or, in other words, to declare that so far as it confers a benefit on the vendee and his creditors it should be upheld, and so far as it imposes a burden upon them it should be destroyed. On what theory may they be allowed to split the contract and enforce the part to their liking and repudiate that which inconveniences them? If the contract of the conditional vendor is void, it is void in all its parts, and if it is legal, it is legal in all its parts.

It is greatly to be hoped that under the decision of the Supreme Court of the United States above referred to, the lower Federal courts will adopt and enforce the New Jersey rule. In any event, the subject is well worth the attention of the legislatures of the Southern States. By a short enactment, the difficulty could be removed. It would be necessary only to provide that the physical attachment of personalty to real estate should not operate to invalidate a reservation of its title held as security for its purchase price, when its removal would occasion no physical injury, and to empower the courts in cases where danger of such injury may exist to require the vendor before removal to indemnify by bond or otherwise those who might be injured.

Henry A. Alexander.

ATLANTA, GA.